IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1444 OF 2007

Ms Darakshan S.A. Shaikh)
B/15 Mariam Manzil,)
Lodha Complex, Mira Road,)
District Thane 401 107)..Petitioner

Versus

1. State of Maharashtra,)

2. The Principal)
Ismail Yusuf College of Arts, Science)
& Commerce, Jogeshwari East)
Mumbai 400060)Respondents

Mr S.S. Pathak for the petitioner.

Ms.S.M. Dandekar, Assistant Government Pleader, for respondent No.1

CORAM: **SWATANTER KUMAR, C.J.** &
DR D.Y.CHANDRACHUD, J.

Judgment reserved on : August 28, 2007
Judgment delivered on: September 20, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

Rule. Respondents waive service. By consent Rule made returnable forthwith. Heard learned counsel for the parties.

2. Vide order dated 5th June 2007, the petitioner was transferred from Ismail Yusuf College of Arts, Science and Commerce, Jogeshwari, Mumbai to Elphinston College, Mumbai. Feeling aggrieved by this order the petitioner has filed the present petition under Article 226 of the Constitution of India praying that the said order of transfer be quashed and set aside, with a further prayer that the report/resolution passed by the respondents in sexual harassment complaint be called for and direction may be issued to the respondents to take stringent action against two Professors i.e. Mr. S.K. Tripathi and Mr. B.B. Rajeshaikh. Further prayer of the petitioner is that the respondents be directed to follow the guidelines laid down by the Supreme Court in the case of Vishaka and ors vs State of Rajasthan, and ors 1997(6) SCC 241.

3. The facts giving rise to this petition are that the petitioner is a lady Professor and was working in the Ismail Yusuf College of Arts, Science, Commerce- respondent No. 2 herein as head of the statistics department from 27th April 2005. The respondent No. 1 controls the affairs of the college of

respondent No. 2 and this college has about l00 staff. The petitioner was initially appointed on temporary basis and was regularized subsequently. Due to promotion of the petitioner as head of the department, number of staff members were not happy and some of the staff members started harassing the petitioner since March 2006. Prof. Deepak Dubey, who had just completed 3 months and was assessing S.Y. B.Sc Physics ATKT papers, made a complaint that the petitioner was pressurizing to increase marks of 2 students bearing roll Nos 8109 and 8110. This complaint was submitted on 22nd March 2006. The petitioner denied the allegations. A Committee was constituted, which submitted its report on 27th November 2006 stating that it was personal enmity between two Professors, whereafter the above mentioned two professors started harassing the petitioner and started using derogatory remarks against her. The petitioner made a complaint to the authorities in regard to the derogatory and undesirable language being used by the two professors against her. The complaint is at Exh C to the petition. No action was taken despite this. The petitioner also made a complaint to the Human Grievance Cell on l6th October 2006. Thereafter she received a letter dated 10th January 2007 wherein she was called for hearing in respect of her complaint of sexual harassment. The Grievance Cell submitted its report and the petitioner was informed that two staff members have been found guilty of sexual harassment and the report was being submitted to the appropriate authority. The petitioner did not know what happened to the said two persons who were found guilty

of the allegations made by the petitioner. She wrote various letters but of no effect and she was told that the matter was confidential and after the vacation when she joined the college on 9th June, 2007, she was shocked to receive a letter of transfer dated 5th June 2007 along with a circular dated 31st May 2007.

4. While challenging the said order of transfer, the case of the petitioner primarily is that instead of punishing the two errant professors found guilty of sexual harassment, the petitioner is being punished as she is being transferred out of the college. According to her, the action of the respondents is contrary to law and more particularly the judgment of the Supreme Court in Vishaka's case (supra) and is also arbitrary and mala fide.

5. It is a settled principle that transfer is an essential incidence of service. It is primarily in the domain of the concerned authority. To claim or prevent transfer to a particular place is not for the employee. The guidelines or rules framed in relation to the transfer do not vest any indefeasible right in an employee. Of course the authorities are expected to act fairly and wherever such action of the authority is tainted with patent arbitrariness, mala fides and colourable exercise of power, the courts would step in and examine the merits of the claim of a transferred person. A reference in this regard can be made to the a recent judgment of this court in the case of V.B Gadekar vs Maharashtra

Housing & Area Development Authority and Another [Writ Petition (Lodging) No. 1428 of 2007 and Ors. decided on 23rd August 2007], wherein the court held as under:

> "------Every provision should be construed so as to achieve the object of the Act and certainly the larger public interest. Government is the biggest employer and to regulate conditions of service, such provisions are made either by virtue of guidelines or by Rules. Once a discretion is vested in the authority, it has to be exercised uniformly and fairly. There is nothing on record before us which could indicate that the discretion has been exercised for mala fide reasons or is arbitrary. In the case of *Harbans Singh* vs. *Union of India and others (* CWP No. 12929 of 1997) decided on 10th September, 1997, the Punjab and Haryana High Court was concerned with a question raised that under the Rules, Chief Booking Supervisor working at Railway Station at Amritsar could not be transferred outside the Division and thus the transfer of the railway employee was contrary to the transfer rules. While rejecting this contention, the Court held as under:
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> "Ministry of Railways have by letter No. (NG)/87/TR/34/ NRIR/JCM of September, 1989 prepared a list of sensitive posts identified for the purpose of periodical transfers. Three categories of staff come under Category-C therein, namely, Commercial Department. The second category is Enquiry/Reservation/Booking Clerk and the third category took in Ticket Collectors/TTEs/Conductors. From this, it can be seen that Booking Clerks and Ticket Collectors are in one category in so far as it relates to periodical transfers. Petitioners being Booking Clerks are Officers, who frequently come into contact with public. Railway Board on coming to know of the mode of operation of these petitioners came to the conclusion that they are to be transferred out of the division.

Learned counsel representing the petitioner brought to our notice a decision of the Division Bench of this Court in *K.C. Agnihotri* vs. *State of Punjab*, 1996 (3) RSJ 850, in support of his argument that Railways cannot transfer petitioners from one division to another. Such a transfer, without their consent, is illegal. In that case an officer of the Treasuries Department was transferred to the office of Director of Evaluation, a separate department. The transfer was from one department to another department without the officer's consent. Therefore, the Bench came to the conclusion that the transfer outside the cadre in a different department without the officer's consent is patently arbitrary and against the principles of natural justice. This decision, according to us, can have no application to the facts on hand. The rules governing the service conditions of the petitioners permit the authorities to transfer a member of the non-gazetted cadre to another division. Policy decisions taken by the Railways permit the authorities to transfer officers holding sensitive posts, where they come into contact with the public, out of the division. When the statutory rule permits the transfer, a Court should not interfere with the same. Especially so is the case when from the files perused, the Tribunal came to the conclusion that it was on account of the malpractices resorted to by the petitioners that they are transferred. According to Their Lordships of the Supreme Court, even if a transfer order is passed in violation of Executive instructions, the Courts, ordinarily should not interfere with the same and affected party's remedy is to approach the higher authorities in the department. Their Lordships observed, “if the Courts continue to interfere with day to day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. (Mrs.Shilpi Bose and others vs. State of Bihar and others, AIR 1991 SC 532).

In *Union of India* vs. *N.P. Thomas,* AIR 1993 SC 1605, their Lordships had considered whether an officer belonging to the Kerala circle of the Department of Telecommunication is liable to be transferred out of that circle. While upholding the transfer outside Kerala Circle, it was observed that since the officer was holding a

transferable post, he has no vested right to remain in the Kerala circle. This statement of law applies on all force to the facts on hand. Petitioners before us are holding transferable posts. They have been transferred out of the division in the exigencies of service to improve the working of the Railways and to benefit the travelling public. The petitioners holding transferable posts have no vested right to remain posted at a place of their choice. They are liable to be transferred from one place to the other."

6. In the case of *Union of India* vs. *N.P. Thomas*, AIR 1993 SC 1605, the Supreme Court while rejecting the contention of the persons transferred as a consequence of promotion, held that the employees holding transferable post have no vested right to remain in original circles and there was no violation of Rules. Similar view was taken by the Supreme Court in the case of *Union of India* vs. *S.L.Abbas,* AIR 1993 SC 2444, where the Court held that the guidelines issued by the Government do not confer upon employees legally enforceable right unless there was violation of the guidelines with ulterior motives or mala fides were attributed to the authorities. Further, the legal principle was enunciated by the Court that the Central Administrative Tribunal cannot substitute its view for the Competent Authority's view even in matters of transfer.

7. Ordinarily, orders of transfer are made in the exercise of administrative authority to meet the exigencies of service and in public interest. How the Administration has to run its affairs is not a matter which squarely falls in the judicial domain. Unless the orders of transfer were in conflict with Rules and were made for ulterior motives or in patent arbitrary exercise of powers, the Court would decline to interfere in such matter. The transfers could be due to exigencies of service or due to administrative reasons. The petitioners in the present case have failed to demonstrate as to how the order of transfer has been passed for collateral purposes or is a patent arbitrary exercise of power. The authorities concerned have

made a class of persons against whom disciplinary action is contemplated. In fact, it has been stated in the reply filed by the respondents in no uncertain terms that they are taking disciplinary action in accordance with the opinion of the Vigilance Department against these Officers for irregularities committed in the special and current repairs in the transit camps all over Mumbai. If the authorities have taken a view that they need to transfer the Officers upon whom show cause notices were served and disciplinary action is contemplated that decision cannot be termed as arbitrary or mala fide. It is a decision obviously taken for administrative reasons and there is no occasion for the Court to go behind the order and examine, like an Appellate Authority, whether or not such order needs to be passed. The expressions “exceptional circumstances” or “special circumstances” have to be read *ejusdem generis* provided that transfer may be made any time in the year in question under the circumstances stated in those provisions. The expression “exceptional circumstances” has been explained in Black's Law Dictionary, Sixth Edition, as conditions which are out of the ordinary course of events, unusual or extraordinary circumstances. The Shorter Oxford English Dictionary on historical principles, Vol.1 A- Mark worthy explains the word “exceptional” - of the nature of or forming an exception, unusual. The discretion is vested in the authorities to make an exception of tenure of two and three years wherever special circumstances exist. Special circumstances should be understood in the concept of service jurisprudence and not in its literal sense. Conditions of service make transfer as a necessary incidence of service. The Rules give protection to an employee to stay at the place of posting for three years but this is subject to the exception that, where in the wisdom of the authority concerned, he should, for administrative and exceptional circumstances, even be transferred during that period. We do not see any fault in exercise of such power. In the present case, from the record before us, there are no patent mala fides or arbitrariness in exercise of power by the respondents. The conduct of the

> petitioners is to be looked into by the authorities and it will neither be just nor fair for the Court to interfere at this stage and hold that the orders of transfer are vitiated on account of mala fide or colourable exercise of power or that they are in violation of the Rules.

6. The petitioner has mainly relied upon the judgment of the Supreme Court in the case of Vishaka (supra) to impugn the order of transfer. No doubt the Supreme Court has laid down various factors as well as guiding principles, which the authorities are expected to take into consideration while dealing with the problems of sexual harassment and gender justice. It has been observed in the judgment that preventive steps should be taken to curb sexual harassment and where the conduct amounts to specific offence under Indian Penal Code or any other law, the employer shall initiate appropriate action in accordance with law for making such complaint with the appropriate authority. A sexually harassed victim should have the option to seek transfer of the perpetrator or his/her own transfer.

7. First, we must notice that the petitioner has not impleaded Mr. Rajeshaikh and Mr. Tripathi as respondents in the present petition though allegations have been made against them and even, to some extent, prayer has also been made for a direction to the authorities to take action against them. The reply affidavit was filed on behalf of

respondent No. 2 whereafter they even filed an additional affidavit dated 16th August 2007. In that affidavit, it has been stated that a Committee was constituted which issued notice to all concerned persons and thereafter recommended that warning should be given to the two lecturers and specific warning was given to both the aforesaid persons. The incident of passing remarks against the petitioner related to the year 2006 and the Committee's decision was given effect to by the authorities. The charges were totally denied by Mr. Tripathi and Mr. Rajeshaikh, still the Committee recommended issuance of warnings to the two persons. In her complaint to the authorities, petitioner had neither prayed for her transfer nor for transfer of said two persons (Professors).

8. The case of the respondents is that the order of transfer of the petitioner is purely on administrative ground and as part of general transfers. Vide order dated 31.5.2007 nearly 15 lectures/professors, including the petitioner, have been ordered to be transferred. The petitioner did not comply with the said order of transfer, whereafter another order dated 5th June 2007 was issued transferring the petitioner to Elphinston College, Mumbai as lecturer and head of department of Statistics and she was requested to join the place of transfer immediately.

9. The petitioner has been transferred within Mumbai and as it was conceded at the Bar, to a College of high education standard, if not better, than the college where she was teaching. We are unable to see that any prejudice has been caused to the petitioner by the said transfer order. It is not a case of an individual transfer but 14 other professors/lecturers have been transferred along with the petitioner and some of them even outside Mumbai.

10. In the affidavit filed on behalf of respondent No. 2 as regards the averment relating to the exercise of pressure upon the lecturers in Physics by the petitioner for increasing marks for two students in ATKT

answer sheets, it was stated that a Committee was appointed and as per the report of the Committee there was sufficient circumstantial evidence in the submission made by Smt Aroskar and Shri Rajeshaikh in relation to Deepak Dubey for increasing marks of two students with roll Nos 8110 and 8111. Thus a warning was issued to the petitioner not to indulge in such irregularities. This report of the Committee was submitted on 8th May, 2006, therefore, obviously the present transfer was not even punitive in its nature as the same has been passed after nearly one year subsequent to the report of the Committee. Once the general transfers are effected, it will hardly be of any advantage to the petitioner to urge that the order of transfer is mala fide or arbitrary and she could not be transferred in terms of the judgment of the Supreme Court in the case of Vishaka (supra). Normally courts would be reluctant to interfere with the orders of transfer as those are primarily and purely administrative actions squarely falling in the domain of the authorities concerned. We are unable to see any element of patent arbitrariness or mala fides on the part of the respondents in passing the impugned order of transfer. In exercise of writ jurisdiction the court cannot infer maladies or arbitrariness but for that there has to be definite material before the court to accept such a contention. The respondents in their wisdom have to effect general transfers and there is nothing on record to show

that such exercise is colourable exercise of the power or intended to frustrate any rule or law. It should be taken that the transfer has been effected in routine and normal course of administrative exigency and it is neither stigmatic nor unfair to the petitioner as she has been shifted to a better college within Mumbai.

11. For the reasons aforesaid, we see no merit in this petition and the same is dismissed while leaving the parties to bear their own costs. Rule stands discharged.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.